Supreme Court, U.S.
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No. 82-896

IN THE

Supreme Court of the United States

October Term, 1982

LORNE J. ACQUIN,

Petitioner

v.

STATE OF CONNECTICUT,

Respondent.

On Writ of Certiorari to The Supreme Court of the State of Connecticut

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the petition for certiorari should be denied because the Connecticut Supreme Court's holding that the defendant waived his fifth amendment right to counsel before confessing is consistent with controlling decisions of this Court?

2. Whether the petition for certiorari should be denied because the Connecticut Supreme Court's holding that the defendant's confession was not obtained in violation of his fourth amendment rights is consistent with settled and controlling decisions of this Court?

3. Whether the petition for certiorari should be denied because the Connecticut Supreme Court's conclusion that the defendant's will to resist was not overborne by the conduct of the State Police is supported by the evidence and is consistent with controlling decisions of this Court?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 16

ARGUMENT: Reasons for Denying the Writ 17

I. The Decision of the Connecticut Supreme Court Is Consistent with this Court's Decisions in *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Rhode Island v. Innis*, 446 U.S. 291 (1980) 17

A. Under the "knowing and intelligent waiver" standards applied by this Court in *Edwards v. Arizona*, the trial court and Connecticut Supreme Court correctly concluded that the defendant waived all his *Miranda* rights before he confessed 18

B. Assuming *Edwards v. Arizona* announced a new standard for waiver of the right to counsel, when that right has been clearly invoked, the Connecticut Supreme Court correctly concluded that the standard was not violated in the defendant's case 22

II. The Connecticut Supreme Court Correctly Concluded that the Defendant's Confession Was Not Obtained in Violation of His Fourth Amendment Rights 25

III. The Connecticut Supreme Court's Conclusion that the Defendant's Will to Resist Was Not Overborne by the Conduct of the State Police Is Supported by the Evidence and Is Consistent with Controlling Decisions of this Court 29

CONCLUSION 30

APPENDIX

TABLE OF AUTHORITIES

CASES

Page

Commonwealth v. Bullock, 459 Pa. 243, 328 A.2d 493 (1974) 24

Commonwealth v. Clark, 454 Pa. 329, 311 A.2d 910 (1973) 24

Cupp v. Murphy, 412 U.S. 291 (1973) 28

Dunaway v. New York, 442 U.S. 200 (1979) 25-26

Edwards v. Arizona, 451 U.S. 477 (1981) 16, 17, 18, 22, 23, 24, 25

Johnson v. Louisiana, 406 U.S. 356 (1972) 17, 27

Johnson v. Zerbst, 304 U.S. 458 (1938) 16, 18, 21

Leuschner v. State, 49 Md. App. 490, 433 A.2d 1195 (1981) 25

Miranda v. Arizona, 384 U.S. 436 (1966) 18, 23-24, 25

Nash v. Estelle, 560 F.2d 652 (5th Cir. 1977), 597 F.2d 513 (5th Cir. 1979) (en banc) 22, 23

Rawlings v. Kentucky, 448 U.S. 98 (1980) 17, 27

Rhode Island v. Innis, 446 U.S. 291 (1980) 17

State v. Acquin, 187 Conn. 647, 448 A.2d 163 (1982) 18, 21-22

State v. Harris, 298 N.W.2d 356 (Minn. 1980) 27

State v. Murphy, 2 Or. App. 251, 465 P.2d 900 (1970) 28

State v. Phillips, 563 S.W.2d 47 (Mo. 1978) 24

State v. Robtoy, 32 Crim. L. Rep. 2189 (Wash. Nov. 10, 1982) 23

United States v. Brunson, 549 F.2d 348 (5th Cir. 1977) 26

United States v. Mendenhall, 446 U.S. 544 (1980) 17, 26, 27

United States v. Morris, 451 F. Supp. 361 (E.D.N.Y. 1978) 27

Wyrick v. Fields, 32 Crim. L. Rep. 4099 (U.S. Nov. 29, 1982) (per curiam) 25

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

This brief is submitted in opposition to a petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Connecticut entered in this proceeding on July 27, 1982.

STATEMENT OF THE CASE

I.

On the early morning of July 22, 1977, the police found nine bodies in the burn-out house of Fredrick Beaudoin at the corner of Cedar Hill Road and Route 68 in Prospect, Connecticut. Eight of the bodies were members of the Beaudoin family, Mrs. Cheryl Beaudoin and her seven small children, ages 4 to 12, and one body was that of Jennifer Santoro, age 6, an overnight guest. All of the children had been beaten, and some were tied up with various bindings. Mrs. Beaudoin had been stabbed. (T-6-11, 7/17/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 1f).

At about 9:30 a.m. on July 22, 1977, Troopers James Blais and George Hamila of the Connecticut State Police met the defendant, Lorne Acquin, in Waterbury, Connecticut, at the home of Joyce Graham, his girlfriend. (T-9-12, 7/5/78). The defendant was Mr. Beaudoin's foster brother and had once lived with the Beaudoin family as a state ward. (T-93-94, 7/14/78). The officers told the defendant about the fatal house fire and asked him to assist them in the investigation by coming with them. (T-11, 7/5/78). The defendant agreed to go with the officers. (T-14, 7/5/78; T-79-80, 7/11/78; T-85, 9/5/79 AM; T-7, 9/5/79 PM). He went with them and a co-worker, Bruce Bennett, first toward Prospect where Bennett was dropped off and then to the Meriden State Police Headquarters. (T-13-16, 7/5/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 1f).

At the Meriden headquarters, approximately one hour after the officers had first met the defendant on July 22, 1977, Trooper James Blais gave the defendant his first *Miranda* warnings. (T-20, 7/5/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 1f).

The second officer to advise Acquin of his constitutional rights was Detective Zdanowicz. The detective advised the defendant of his constitutional rights at Meriden shortly after he arrived there

at approximately 11:00 a.m. (T-45, 7/6/78). This warning, like many other parts of the conversation at Meriden, was recorded on tape. (State's Exhibit A for Suppression Hearing, T-90-91, 7/11/78). The tape recording reflects that the defendant was repeatedly assured he was not under arrest, and that nowhere there was he accused of the crimes. (State's Exhibit A for Suppression Hearing, T-90-91, 7/11/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 1f).

Detective Zdanowicz then took an oral statement from the defendant concerning his visit to the Beaudoin house and whereabouts that night. In that statement, Mr. Acquin stated that after visiting the Beaudoin residence, he went to a number of Waterbury bars on the night of July 21, 1977, using Joyce Graham's Rambler. He stated that the last place he visited was a bar on Watertown Avenue. He said that he stayed for awhile, left at about 1:00 a.m. and then drove around Waterbury for a short period of time until he went home. (T-47-48, 7/6/78). Nowhere in that original statement did the defendant mention anything about being mugged.

Thereafter, while Detective Zdanowicz was taking a written statement from Mr. Acquin, between 11:00 a.m. and 1:30 p.m., the detective asked Mr. Acquin how he had received the wounds on his face. (T-50, 7/6/78). The defendant claimed that he sustained his facial wounds, was kicked violently on the left side, and was knocked to the ground while being mugged as he left the last bar after 1:00 a.m. on July 22. (T-51, 7/6/78).

Mr. Acquin indicated that he had not notified the police about this assault and robbery. Mr. Acquin was asked by the detective if he could see his skin for bruises, contusion marks and abrasions. Detective Zdanowicz then examined Mr. Acquin's side and found no wounds, discoloration, abrasions, scratches, cuts, soreness or stiffness. He found nothing. (T-51-53, 7/6/78). A search of the records of the Waterbury Police Department also revealed that this alleged mugging was never reported. (T-37, 7/17/78). Detective Zdanowicz telephoned in, to his headquarters, the infor-

mation about Mr. Acquin's oral and written statements and the variance between the two statements, because he considered the omission of the mugging incident in the first statement to be a "fantastic oversight." (T-58-60, 7/6/78). The fact that Mr. Acquin's injuries did not go with a "mugging job," as he had described the mugging, caused Detective Zdanowicz, an experienced detective, to feel that Acquin was a suspect in this case. (T-123, 7/6/78).

Detective Zdanowicz wrote out the statement of Mr. Acquin, and after Mr. Acquin directed that Zdanowicz make a few changes, the statement was read to Mr. Acquin, word for word. (T-94, 95, 7/6/78).

After the statement was read to Mr. Acquin, Detective Zdanowicz asked Acquin to sign the statement, but he refused. (T-55, 7/6/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 1f-2f).

After the interview of Mr. Acquin was concluded in Meriden, Trooper George Hamila and Detective Zdanowicz, in Zdanowicz's car, proceeded to drive the defendant back home to Waterbury at about 1:30 p.m. (T-95, 7/11/78). Trooper Hamila was first to pick up his car where he had left it at the Beaudoin residence and then drive the defendant to Waterbury. Trooper Zdanowicz was then to proceed in his car to the Prospect Command Post. (T-95-96, 7/11/78). As they approached Route 69 and Summit Road in Prospect, however, Mr. Acquin said that he did not want to go to the Beaudoin residence. The defendant said that if the troopers were going there, they should let him out and he would either walk or take a cab to Waterbury. (T-96, 7/11/78). The defendant's protest was vehement that he did not want to pass the Beaudoin residence. (T-25, 7/17/78).

Trooper Hamila dropped off Zdanowicz at the Prospect Town Hall and then drove Zdanowicz's car north on Route 69 toward Waterbury to take the defendant, who was in the front seat, home. (T-98, 7/11/78).

About a quarter of a mile north of the Command Post, the defendant wanted some cigarettes, and Hamila stopped at a Cumberland Farms Store. Mr. Acquin left the car and went into the store. Trooper Hamila also followed him into the store where they both bought cigarettes. (T-98, 7/11/78). When they returned to the car and as they were driving towards Waterbury, Hamila received a radio message to bring the defendant to the Bethany State Police Barracks. (T-99, 7/11/78). When Hamila advised the radio dispatcher that he would call in, the same message was repeated. (T-99, 7/11/78). Mr. Acquin told Hamila, who had then turned the car south toward the Bethany Barracks, that he did not want to go to the barracks, and the defendant unlatched the car door while the car was moving. (T-99-100, 7/11/78). Hamila pulled the car to the shoulder to allow the defendant to leave the car and assured the defendant that they would go to the barracks to find out what was wanted, and then he would take the defendant home. (T-100, 7/11/78). Mr. Acquin, who had left the car, returned to the vehicle, but then left it again and started walking northerly on Route 69 toward Waterbury. (T-100, 7/11/78). Trooper Hamila reported this event to the radio dispatcher and followed the defendant up Route 69 in the cruiser. (T-101-02, 7/11/78).

Shortly after the defendant had alighted from the car, at approximately 2:00 p.m., Lt. Shay and other officers in two police cars travelled northerly on Route 69 from the Command Post. Lt. Shay got out of one of the vehicles, crossed the street and approached Mr. Acquin. (T-102, 7/11/78). When Lt. Shay first observed Mr. Acquin on Route 69 at about 2:00 p.m., he noticed that Mr. Acquin had scratches on his face and what appeared to be a burn mark on his right eyelid. He also noticed a mark on his left wrist that also looked like a burn mark. (T-16, 7/17/78). Lt. Shay then asked Mr. Acquin if he were Lorne Acquin and asked, "Do you want to help us with this case?" Mr. Acquin replied, "Yes," and with that Lt. Shay walked with Mr. Acquin back to Hamila's car. Lt. Shay had his hand on Mr.

Acquin's shoulder as they walked to Trooper Hamila's car. (T-103-04, 7/11/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 2f).

II.

Lt. Shay had received the following information prior to his first meeting Mr. Acquin on Route 69 (T-18, 7/17/78):

The first piece of information Lt. Shay received was that the defendant, Lorne Acquin, had been a visitor at the Beaudoin home on the night of July 21, 1977. (T-13, 7/17/78). He also was told by Sgt. Joseph Dynderski that the defendant had a reputation for violence and that he had escaped on one occasion from the State Police. He was also told that the defendant had a long and serious criminal record. (T-13, 7/17/78).

Prior to receiving this information, Lt. Shay had viewed the crime scene and the victims, each of whom had died as the result of extreme violence. (T-6-11, 7/17/78).

Lt. Shay received further information from Rose Ann Paolino, a neighbor of the Beaudoin's, who said that at about 7:30 p.m. on Thursday, July 21, she had heard the Beaudoin children shouting the name "Uncle Lorne." (T-19, 7/17/78).

Lt. Shay learned from Donna Paolino, another neighbor of the Beaudoin's, that she had seen a black car, about the size of a Rambler, parked at the Beaudoin home at about 10:00 p.m. on the night of July 21. She said further that she had seen this car parked at the Beaudoin home several weeks earlier when Lorne Acquin was visiting the Beaudoin home. (T-19-20, 7/17/78).

Mrs. Frances Paolino, Donna Paolino's mother, told Lt. Shay that at about 8:30 p.m. on July 21, 1977, she had seen a black Rambler drive up Cedar Hill past her home and then come back down the street. She related that the driver matched Mr. Acquin's description. (T-18, 20, 7/17/78).

Mrs. Paolino also told Lt. Shay that at about 3:45 a.m., on July 22, she was awakened by the strong smell of smoke. She stated further that she looked out her living room window toward the Beaudoin home. At this time, she observed a dark colored car drive up Cedar Hill Road at a high rate of speed and then come back down the street at a high rate of speed. She also said that the car tail lights went on as the car passed her house. Shortly thereafter, she called the fire department to report the Beaudoin house fire. (T-20-21, 7/17/78).

Lt. Shay was told by Raymond Caruso that he had seen Lorne Acquin drive a dark colored Rambler past his house to the end of Cedar Hill Road (a dead-end street) and then drive back down Cedar Hill Road at about 8:30 p.m. on July 21. He also told Lt. Shay that he had seen Lorne Acquin driving the car down Cedar Hill Road past his house at about 9:45 p.m. that same evening. (T-21-22, 7/17/78).

Caruso further told Lt. Shay that he was aware that Lorne Acquin had been involved in an arson case and had a very serious criminal record. (T-22, 7/17/78).

From Janice Blake, another neighbor, Lt. Shay learned that Michael, her son, had informed her that Lorne Acquin had driven up to the Beaudoin house at about 8:00 p.m. on July 21. Michael also told his mother that Fred Beaudoin, Jr., age eleven, had also informed him that Lorne Acquin was going to spend that night at the Beaudoin residence; that is, Mr. Acquin was going to be there from July 21 through July 22 as an overnight visitor. (T-22-23, 7/17/78).

Frank Bainer reported to the State Police that he had recently overheard Mr. Acquin bragging that he had killed five or six people in Detroit, Michigan. Bainer also stated that one Pat Walsh had seen Lorne Acquin, between 8:00 and 9:30 p.m. on July 21, at St. Anthony's Church parking lot at Prospect center, not far from the murder scene. (T-23, 7/17/78).

Barbara Olander had told the lieutenant that Lorne Acquin once lived with the Fred Beaudoin family. She added that while Acquin lived there, the house caught on fire. (T-23, 7/17/78).

From Fredrick Beaudoin, Sr., husband of Cheryl Beaudoin and father of seven of the nine victims, Lt. Shay learned that Cheryl Beaudoin had not told her husband that Mr. Acquin was a visitor at the house on the evening of July 21. Lt. Shay was suspicious that there was probably some reason why she did not tell her husband that Mr. Acquin was visiting at the home. (T-24, 7/17/78). Mr. Beaudoin had gone to work at Pratt & Whitney that evening about 11:00 p.m. and was to return home the next morning. (T-3-5, 7/18/78).

Trooper James Blais told Lt. Shay that when he met Mr. Acquin in Waterbury at about 9:30 a.m. on July 22 and told him that his foster relations were dead, Mr. Acquin showed no surprise or emotion. (T-24-25, 7/17/78).

From Detective Joseph Zdanowicz, who replaced Blais at Meriden, Lt. Shay learned that Acquin was all marked up, having fresh scratches on his face. He also knew that Mr. Acquin had told Detective Zdanowicz that he received the scratches when he was mugged in Waterbury on the night of July 21-22, 1977. (T-25, 7/17/78).

III.

The third officer to advise the defendant of his constitutional rights was Trooper George Hamila. He advised Acquin of his rights at the Town Hall in Prospect, the Command Post, shortly after 2:00 p.m. on Friday, July 22, 1977, when he interviewed him as to his whereabouts on July 21 through July 22. (T-108, 116-18, 7/11/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 2f).

While being interviewed at Prospect after being advised of his *Miranda* rights, and while a second written statement as to his whereabouts on July 21 and 22 was being prepared (T-119,

7/11/78), the defendant told the police that he was in trouble and that he wished to see an attorney. (T-7, 7/12/78). After being asked by Captain McDonnell which attorney he wanted and whether he wished his brother to obtain an attorney, the defendant stated he would only trust Dr. Albert who had been the jail psychiatrist when the defendant had previously been in custody in other cases. (T-74-76, 7/18/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 2f-3f).

The following occurred:

> A. (By Captain McDonnell) I asked him who he wanted. And there were very long pauses before he would respond to my questions. And, then he said he didn't know: asked him: did he have anyone in particular in mind. He said no. I asked him: how about the attorney that you had last time. And, he told me that he didn't trust that attorney and he didn't want him. I asked him—told him that: was there anybody else, another attorney. He said no, there wasn't another attorney that he wanted or trusted. I asked—Then I told him: if he couldn't pick an attorney that I would make calls and get a public defender or the state would provide an attorney for him. And, he replied to that that he didn't want the attorney that we—that I would call. He said: it would be just like talking to another cop. He didn't want any attorney that we choose. I then asked him about his family. I told him: I was pretty sure that his brother was in the building someplace, although I hadn't seen his brother, could his brother get an attorney for him.
>
> Q. What did he say?
>
> A. He said no. He didn't want his brother to get involved. He didn't want his brother to even know he was in the building or he didn't want his brother to know that he was involved here in the building with us.

Q. Then what happened?

A. Then we continued to talk about how would we find him an attorney, how would we get an attorney for him. And, he said that he—it wasn't really an attorney that he wanted, it was just somebody that he could trust. He wanted to sit and have somebody sitting with us that he trusted before he had any further conversation. And, I asked him who that, you know—is there such a person, who can we get for you. And, he suggested a Dr. Albert, who I was not familiar with and didn't know who he was. And, I asked who he was and how he knew him. And, he told me that he knew him from the New Haven Jail and he thought he was employed at the New Haven Jail.

About that time I went out to Lieutenant Shay and I told Lieutenant Shay that he wanted a Dr. Albert and to get a hold of Dr. Albert and have him come to the command center where we were.

Q. Did you ask Acquin whether or not Dr. Albert was a lawyer?

A. Yes, I did. And, he said that he knew he was a—I think he was referring to him by a slang expression. He was calling him either a shrink or a head doctor or something like that, but wasn't sure whether or not he was an attorney. And, I told him that, you know, that Dr. Albert couldn't play the part of an attorney if, in fact, he wasn't an attorney. And, Acquin just kept saying that he wasn't really concerned about that, what he wanted was somebody to sit in that he could trust and be with him.

Q. Did he say he trust Dr. Albert?

A. He said he trusted a Dr. Albert very, very much. In fact, he said that, while this conversation was going

> on, that he had told me and Dr. Albert some things that we were the only two he had ever told, he hadn't even told some of his family members.

(Trial Court Memorandum of Decision, Petitioner's App. F at 11f-15f).

The police respected the defendant's wishes, did not question him concerning the murders and arranged Dr. Albert's coming to the defendant. (Trial Court Memorandum of Decision, Petitioner's App. F at 2f-3f, 16f). While waiting for Dr. Albert at the Prospect Town Hall, Captain McDonnell did note Mr. Acquin's physical appearance and asked Mr. Acquin to show him any marks on his body. Mr. Acquin took down his trousers to show Captain McDonnell some scratches on his thighs. (T-11-12, McDonnell, 7/19/78). Then the defendant left the Command Post and had something to eat at a restaurant parking lot.

The defendant was advised of his rights, for the fourth time, shortly after he arrived at Bethany Barracks. The defendant had requested to go to the Bethany Barracks because he did not want to return to the Prospect Town Hall Command Post. (T-80-81, 7/18/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 3f). At the Bethany Barracks, the defendant was left alone and took a nap.

When Dr. Albert arrived at the barracks, Captain McDonnell ascertained that Dr. Albert was not an attorney and so informed the defendant. (T-85, 7/18/78). When Dr. Albert first met with the defendant, Dr. Albert asked to be alone with Mr. Acquin, and Captain McDonnell left the room. (T-21, Dr. Albert, 7/7/78). After Dr. Albert and the defendant met alone, Dr. Albert called Captain McDonnell back into the room. (T-22, Dr. Albert, 7/7/78). It was after consulting privately with Dr. Albert (T-21-22, Dr. Albert, 7/7/78) that Acquin then gave a detailed inculpatory written statement to both Captain McDonnell and Trooper Hamila in the presence of Dr. Albert. (T-89, 7/18/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 16f, 19f).

Trooper Hamila advised the defendant of his rights, for the fifth time, shortly after Dr. Albert arrived at Bethany at about 11:45 p.m. and just before he took the written detailed statement from Acquin. (T-14-16, 7/12/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 3f). During the time he was with the police and before he gave his detailed inculpatory statement, the defendant, a twenty-seven year old with previous criminal experience, received at least five *Miranda* warnings. (Trial Court Memorandum of Decision, Petitioner's App. F at 10f).

As the defendant gave his statement, Trooper Hamila wrote it down in longhand and gave it to Sergeant Geoghan who typed it. (T-16-17, 7/12/78). Trooper Hamila then read the completed typed statement aloud in the presence of Mr. Acquin who had a copy, and Mr. Acquin turned the pages of the statement in sequence as Hamila read the statement. (T-24-25, McDonnell, 7/19/78). Lorne Acquin then signed the seven-page typewritten statement and initialed each page at about 5:10 a.m. on July 23. (State's Exhibit G for Suppression Hearing, T-37-38, Dr. Albert, 7/7/78) (T-35-36, Dr. Albert, 7/7/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 3f).

Sergeant Geoghan took the defendant's acknowledgement, and Captain McDonnell and Dr. Albert witnessed the signing of the document by Acquin. (T-18, 7/12/78). In the first paragraph of the written confession, the defendant acknowledged that the statement was true and voluntary and was made "without fear, threat or promise of any reward." Acquin also indicated in the statement that he had been fully advised of his constitutional rights by Trooper Hamila and that he fully understood his rights. (State's Exhibit G for Suppression Hearing, T-37-38, Dr. Albert, 7/7/78).

After giving this written detailed statement, the defendant gave a written consent to search the auto of Joyce Graham and consent that hair, blood and urine specimens be taken from him. (Trial Court Memorandum of Decision, Petitioner's App. F at 3f-4f).

The defendant stated in his written detailed statement that his clothing, covered with blood after the killings, was put into a garbage bag and taken from his girlfriend's house by trash collectors on the morning of July 22. (State's Exhibit JJJJ, T-33-34, 8/14/79 PM). However, the blood soaked clothing was found by a trooper, doing a neighborhood investigation, in an opened trash bag still at the rear of Joyce Graham's house on July 22. (T-24-26, 9/11/79 PM).

That clothing was covered with blood which was found to be of the same type as that of Cheryl Beaudoin. (T-51-65, 9/13/79 AM). Head hairs similar to that of Debbie Beaudoin were also found on the clothing. (T-25-27, 9/14/79 PM).

Some singed hair was also found among the defendant's head hair samples. (T-40-44, 9/14/79 PM) (State's Exhibit 6Q1, T-41, 43, 9/14/79 PM).

IV.

At his trial, the defendant testified in support of his motion to suppress the fruits of searches undertaken pursuant to his consent and claimed to have been fruits of his confession.

Mr. Acquin testified that on the morning of July 22, he agreed to accompany the officers to help in the investigation of the Beaudoin fire (T-85, 9/5/79 AM), and that he went to Meriden with the officers without protest (T-7 9/5/79 PM) where he was read his *Miranda* rights and advised he was not under arrest. (T-10-11, 9/5/79 PM).

He further testified that he refused to sign the *Miranda* card at Meriden because he went there to help the police investigate the murders and not to be arrested. (T-11, 9/5/79 PM).

With respect to the incident on Route 69, Mr. Acquin testified he did leave Trooper Hamila's vehicle and start to walk home. Shortly thereafter he was approached by Lt. Shay and asked if he were Lorne Acquin and if he would help the police with the in-

vestigation of the fire. (T-18, 9/5/79 PM). He testified he made no reply and was escorted by the officers back to Hamila's police car. (T-19, 9/5/79 PM).

After arriving at the Prospect Command Post, the defendant testified he was asked for and began to give a statement concerning the three previous days. (T-20-22, 9/5/79 PM). As he gave his statement to Trooper Hamila, Acquin testified, he asked for an attorney and specifically requested Captain McDonnell to call Attorney Engelman. He testified he was offered a public defender which he refused. (T-26-27, 9/5/79 PM). Thereafter, Acquin testified he asked for Dr. Albert because he trusted Dr. Albert and stated he would give a statement when Dr. Albert arrived. (T-31, 9/5/79 PM). Acquin testified it was he who brought up the name of Dr. Albert who was later present when Acquin gave his statement. (T-109-17, 9/5/79 PM).

It was at his request, Acquin testified, that he did not return to Prospect after going to Howard Johnson's Restaurant for supper, but went to Bethany Barracks. (T-33, 9/5/79 PM). At Bethany Barracks, he testified, he dozed in a chair while he waited for Dr. Albert to whom he spoke alone when Dr. Albert first arrived. (T-37-38, 9/5/79 PM). It was thereafter that he gave his statement to the police. (T-39-46, 9/5/79 PM).

Acquin testified he was twenty-nine years old in 1979, had been arrested twelve times in the past and was familiar with the *Miranda* warnings. (T-51-52, 9/5/79 PM). He testified and demonstrated that he could read (T-53-86, 9/5/79 PM) and testified that he had completed one year of high school. He further testified that he did sign the statement given to Captain McDonnell and Trooper Hamila and witnessed by Doctor Albert. (T-53-59, 66, 9/5/79 PM).

In the course of this hearing to suppress, other witnesses as well as Mr. Acquin testified concerning the circumstances of Mr. Acquin's confession. The trial court found the consents were valid. (Trial Court Memorandum of Decision, Respondent's App. A).

At the conclusion of the trial, the defendant filed a motion for a new trial and for a judgment of acquittal. One of the claims in the motion was that the court had erred in ruling upon evidence during the trial and in ruling upon motions.

In a memorandum of decision dated November 19, 1979, Judge Pickett referred to Judge Wall's memorandum of February 28, 1979, and stated: "[T]his court also heard many of the same witnesses as well as Mr. Acquin during a hearing on a motion to suppress tangible evidence, and concurs in the findings of Judge Wall." (Trial Court Memorandum of Decision, Respondent's App. B at 3b).

V.

At the trial, evidence was introduced that Cheryl Beaudoin, the mother, was the victim of multiple fractures of the skull and stab wounds (T-97-98, 8/1/79 AM), that Fredrick Beaudoin, Jr., age 12, suffered a skull fracture (T-20, 8/3/79), and that Paul Beaudoin, age 8 (T-46, 8/2/79 AM), Roderick Beaudoin, age 7 (T-9, 8/2/79 PM), Jennifer Santoro, age 6 (T-42, 8/2/79 PM), Debbie Beaudoin, age 9 (T-27-28, 8/7/79 AM), Sharon Beaudoin, age 11 (T-29, 8/7/79 PM), Holly Beaudoin, age 6 (T-51, 8/3/79 PM), and Mary Lou Beaudoin, age 4 (T-65, 8/3/79 PM), all suffered skull fractures and inhaled smoke.

Due to a mislabeling of ante mortem photographs, up to the time of the middle of the trial it had been believed that the body of Debbie Beaudoin exhibited an injury to the vagina. However, the body bearing the vaginal injury was in reality that of Sharon Beaudoin. (T-5-6, 8/8/79 AM).

In his statement the defendant stated it was Sharon's body that he had rubbed and that he may have touched her vagina with his finger the night of the murders. (State's Exhibit JJJJ, p. 6, T-33-34, 8/14/79 PM).

At the trial, the State also offered evidence, not heard by the jury, that while at the Whiting Forensic Institute in October, 1977,

the defendant told a reporter for the *Hartford Courant* that he recalled talking to Cheryl the night of the killings and next recalled bodies and blood all over the place and the house being on fire before he fled the Beaudoin house. (State's Exhibit 7J's, T-5-7, 10/3/79 PM).

VI.

As can be seen by a review of the petitioner's and the respondent's statements of facts, serious conflicts as to facts appear to exist. The respondent submits that specific references do support its facts and that this Court should not be asked, "in the interest of brevity and the preliminary nature of this petition" (Petition at 5 n.1), to decide legal issues on "facts" in summary form rather than on those facts specifically supported in the record.

The respondent does not imply that many of the "facts" in the petition, not directly contradicted by the respondent's statement of facts, can find support in the record, but page limitations preclude their specific denial in this brief.

SUMMARY OF ARGUMENT

1. The petition for a writ of certiorari should be denied because the Connecticut Supreme Court's holding that the defendant waived his right to counsel is consistent with controlling decisions of this Court. First, as required by *Edwards v. Arizona,* 451 U. S. 477 (1981), the trial court and the Connecticut Supreme Court applied the *Johnson v. Zerbst* "knowing and intelligent" waiver standard in reaching the conclusion that the defendant had waived all his *Miranda* rights before confessing. Second, in light of the facts of this case, the Connecticut Supreme Court's conclusion that the defendant waived his right to counsel is consistent with this Court's holding in *Edwards.*

2. The petition for a writ of certiorari should be denied because the Connecticut Supreme Court's conclusion that the defendant's confession was not obtained in violation of his fourth

amendment rights is consistent with settled and controlling decisions of this Court. When the police first met the defendant at 9:30 a.m. on July 22, 1977, the defendant agreed to accompany the police. Therefore, under this Court's holding in *United States v. Mendenhall,* 446 U.S. 544, 511-12 (1980), there was no "seizure" of the defendant at that time. Prior to the 2:00 p.m. meeting on the highway with Lt. Shay, the defendant had not been "seized," since, under all of the circumstances, a reasonable person would have believed that he was free to leave. *See United States v. Mendenhall,* 446 U.S. at 554. At 2:00 p.m., probable cause had arisen to detain the defendant. Since the defendant gave his confession well after 2:00 p.m., it cannot be said that any illegal detention lead to the defendant's confession. *See Rawlings v. Kentucky,* 448 U.S. 98 (1980); *Johnson v. Louisiana,* 406 U.S. 356, 365 (1972).

3. The petition for a writ of certiorari should be denied because the Connecticut Supreme Court's conclusion that the defendant's will to resist was not overborne by the conduct of the State Police is supported by the evidence and is consistent with controlling decisions of this Court. Dr. Joel Albert, a psychiatrist and neutral third-party, was present, at the defendant's request, when the defendant gave his confession. Dr. Albert testified, based on firsthand knowledge, that the defendant's confession was voluntary. Furthermore, the respondent submits that the resolution of this factual issue is not one calling for the grant of certiorari because of "special and important reasons."

ARGUMENT

REASONS FOR DENYING THE WRIT

I.

The Decision of the Connecticut Supreme Court Is Consistent with this Court's Decisions in *Edwards v. Arizona,* 451 U.S. 477 (1981), and *Rhode Island v. Innis,* 446 U.S. 291 (1980).

A. Under the "knowing and intelligent waiver" standards applied by this Court in *Edwards v. Arizona,* the trial court and Connecticut Supreme Court correctly concluded that the defendant waived all his *Miranda* rights before he confessed.

There is no question that before the defendant gave his written confession, he was five times advised in full of his rights as set forth in *Miranda v. Arizona,* 384 U.S. 436 (1966). (Trial Court Memorandum of Decision, Petitioner's App. F at 10f; Connecticut Supreme Court Decision, Petitioner's App. A at 48a).

The issue presented is whether the defendant waived those rights before he gave his oral and written detailed confessions on the night of July 22 and early morning of July 23, 1977. This issue was recently discussed in *Edwards v. Arizona,* 451 U.S. 477, 482 (1981), where this Court held that the Arizona Supreme Court applied an erroneous standard for determining waiver where the accused had specifically invoked his right to counsel. The Arizona Supreme Court was held to have erred in finding a voluntary waiver without also finding "a knowing and intelligent relinquishment or abandonment of a known right or privilege," as required by *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). The trial judge in this case, however, specifically found that "the defendant had knowingly and intelligently waived his right to counsel." (Trial Court Memorandum of Decision, Petitioner's App. F at 17f).

In this case the evidence is quite clear, and it was so found by the trial judge, that the defendant requested that Dr. Albert be with him when he spoke to the police and that he waived counsel after Dr. Albert had been with him and conferred with him. (Trial Court Memorandum of Decision, Petitioner's App. F at 19f-20f). As the defendant recognized in his petition, both the defendant and Dr. Albert testified that they met alone, and after this meeting Dr. Albert called Captain McDonnell back into the room and the defendant's confession was taken. (Petition at 16; T-21-22, Dr. Albert, 7/7/78; T-38, 9/5/79 PM).

The exchange leading to the defendant's request for Dr. Albert came about when the defendant told Captain McDonnell that when he asked for an attorney it really was not an attorney he wanted but somebody he could trust to be there with him before he had any further conversation with the police. This conversation occurred after Captain McDonnell told the defendant that he would call any attorney the defendant wished, a public defender, or that he would contact the defendant's brother who might be at the Prospect Command Post to obtain an attorney for the defendant. The defendant replied that he had no attorney in mind that he wanted or trusted, that he did not want a public defender and that he did not want his brother involved or even to know that he was in the building. It was then that the defendant suggested Dr. Albert whom Captain McDonnell did not know. Captain McDonnell asked the defendant if Dr. Albert was a lawyer, and Mr. Acquin replied that Dr. Albert was "a shrink" and he was not sure whether or not he was an attorney. Captain McDonnell then stated if Dr. Albert was not an attorney, Dr. Albert could not play the part of an attorney. The defendant repeatedly stated he was not really concerned with that, that what he wanted was somebody he trusted to be with him. (Trial Court Memorandum of Decision, Petitioner's App. F at 11f-18f).

When Dr. Albert did arrive at the Bethany Barracks, Captain McDonnell determined that Dr. Albert was not an attorney and so informed Lorne Acquin. (T-85, 7/18/78). After Dr. Albert conferred alone with the defendant and was assured by the defendant that he wanted him to be with him, Dr. Albert called Captain McDonnell into the room with the defendant. (T-21-22, Dr. Albert, 7/7/78). In response to Captain McDonnell's question, "What happened?", the defendant stated he wished the police to ask him specific questions which he did answer while Dr. Albert was with him. (T-85-86, 7/18/78) (Trial Court Memorandum of Decision, Petitioner's App. F at 16f).

Dr. Albert had been present when Mr. Acquin was advised of his rights, including his right to have counsel present. (T-23,

25-26, Dr. Albert, 7/7/78). If Mr. Acquin had asked for counsel, Dr. Albert testified, and he was not getting counsel, Dr. Albert would have made it clear the defendant was not being given his rights and would have told him to remain silent. (T-58-59, 7/14/78). If the defendant had asked for counsel, according to Dr. Albert, and did not get one, Dr. Albert would have done something about it. (T-82, 7/12/78).

While the formal written statement was being prepared from the oral statement, the defendant and Dr. Albert were alone and at that time Mr. Acquin asked Dr. Albert whether he should have or have had counsel. (T-74, 7/12/78). Dr. Albert stated if the defendant wanted counsel that would be perfectly fine and it was Mr. Acquin's decision, it was up to him to determine. (T-45-46, 7/14/78). Up to that point Mr. Acquin had not made any mention to Dr. Albert that he had asked for counsel, and it did not appear to Dr. Albert that Mr. Acquin was actively looking for a lawyer. (T-59, 7/14/78). It appeared to Dr. Albert that it was very important for the defendant to unburden himself. (T-59, 7/14/78).

Thereafter, the defendant read, had read to him, initialed and signed a seven-page typewritten detailed statement which began by stating that the defendant had been fully apprised of his rights and understood them. (T-46, 61, 9/5/79 PM) (Trial Court Memorandum of Decision, Petitioner's App. F at 3f).

The process leading to this confession and the very confession itself were witnessed in this case by an individual called to the police station at the suggestion of the defendant. Dr. Albert, an experienced psychiatrist, with a reputation as "conscience of the administration" (T-3, Dr. Albert, 7/7/78) or "ombudsman" of the Connecticut jail system (T-111, 7/12/78), was asked his opinion of the defendant's condition when he waived his rights and gave his statement. (T-38-39, Dr. Albert, 7/7/78). Dr. Albert stated the defendant appeared "under control." (T-39, Dr. Albert, 7/7/78).

As Dr. Albert described the defendant, the defendant recognized Dr. Albert whom he had not seen in quite awhile, was able to talk in a clear, rational, coherent manner, was responsive to questions and gave vent to no emotional outbursts. (T-83-84, 7/12/78).

Dr. Albert also testified the defendant's statement was voluntary. (T-17, 7/14/78). Dr. Albert testified, further, that he observed the police used no pressure on the defendant (T-71, 7/12/78), and exercised no coercion or manipulation (T-91, 7/12/78), and that the defendant's statements were given of his own free will. (T-96, 7/12/78). The doctor stated that when the defendant first confessed to the police he did so "in a spontaneous" manner. (T-22-23, Dr. Albert, 7/7/78).

The doctor was present when the defendant was twice advised of his rights, and he observed that the defendant acknowledged his rights and understood them before his detailed statement was written down in longhand by Trooper Hamila. (T-23, 26, Dr. Albert, 7/7/78; T-71-72, 7/12/78). The doctor observed that the defendant then understood what was going on and that he knew what it meant to have or not have an attorney. (T-78, 7/12/78).

The trial judge in this case found that, in view of all the evidence, the defendant did waive his right to remain silent. (Trial Court Memorandum of Decision, Petitioner's App. F at 19f). The evidence does support this finding. Dr. Albert specifically testified that he was present when the defendant refused to sign the *Miranda* card but verbally agreed to go on with the proceedings leading to his confession. (T-71, 7/12/78).

Based on all the facts discussed above, the trial court found: "It is an inescapable conclusion that Lorne Acquin knowingly and intelligently waived his fifth and sixth amendment rights to remain silent and to have counsel during the interrogation." (Trial Court Memorandum of Decision, Petitioner's App. F at 19f-20f).

The Connecticut Supreme Court, also applying the *Johnson v. Zerbst* standard, upheld the trial court's conclusion that the de-

fendant knowingly and voluntarily waived his rights to counsel and to remain silent. (Connecticut Supreme Court Decision, Petitioner's App. A at 47a-49a).

In considering the waiver issue, both the trial court and the Connecticut Supreme Court properly focused on whether the defendant understood his *Miranda* rights and intelligently, knowingly and voluntarily relinquished them. The State court decision on this issue then is in accord with this Court's holding in *Edwards* that a waiver of counsel must not only be voluntary but also a knowing and intelligent relinquishment of a known right. *Edwards,* 451 U. S. at 482-84.

B. Assuming *Edwards v. Arizona* announced a new standard for waiver of the right to counsel, when that right has been clearly invoked, the Connecticut Supreme Court correctly concluded that the standard was not violated in the defendant's case.

The majority of this Court in the *Edwards* case held that the police may not "at their instance" "reinterrogate" an accused in custody if he has clearly asserted his right to counsel. *Edwards,* 451 U. S. at 485. With respect to this requirement, this Court pointed out that an accused could waive counsel without having had access to counsel by "initiating" a meeting with the police, and further that, absent any interrogation, there would be no need to determine if there was a valid waiver of counsel. In a footnote explaining this discussion, this Court noted a series of Courts of Appeals' cases finding a valid waiver in the absence of counsel. In that footnote this Court appears to adopt the rule in the Fifth Circuit that where the right to counsel is clearly invoked a valid waiver cannot be found unless the accused initiates the renewed contact. That footnote ends, however, with this observation:

> Waiver is possible, however, when the request for counsel is equivocal. *Nash v. Estelle,* 597 F.2d 513 (CA5 1979) (en banc).

Edwards, 451 U. S. at 486 n.9.

In his memorandum of decision, the trial judge found that "the defendant's request for counsel was 'indecisive' and under the circumstances Captain McDonnell was correct in making an inquiry into whether the suspect did or did not want counsel present. *Nash v. Estelle,* 560 F.2d 652, 658 (5th Cir. 1977)." (Trial Court Memorandum of Decision, Petitioner's App. F at 16f).

The respondent submits that in upholding the trial court's decision, the Connecticut Supreme Court correctly interpreted the holding and the "equivocal request" discussion found in *Edwards. Cf. State v. Robtoy,* 32 Crim. L. Rep. 2189 (Wash. Nov. 10, 1982) (Washington Supreme Court adopts Fifth Circuit rule on equivocal request for counsel).

As pointed out by Justice Powell in his concurring opinion, the term "initiate" in the *Edwards* case was used to describe a case where a suspect was taken from his cell against his will and subjected to renewed interrogation. Justice Powell observed that "the police do not impermissibly 'initiate' renewed interrogation by engaging in routine conversations with suspects about unrelated matters and may legitimately inquire whether a suspect has changed his mind about speaking to them without an attorney." *Edwards,* 451 U.S. at 490. The equivocal request for counsel thus occurred here during a permissible conversation. Mr. Acquin's waiver of counsel is valid in these circumstances and his "initiation" of the conversation was not required.

Miranda v. Arizona supports this conclusion as well. In approving the procedures for interviews established by the FBI, this Court, in *Miranda,* described FBI conduct when the person being interviewed asks for counsel:

> " 'When the person who has been warned of his right to counsel decides that he wishes to consult with counsel before making a statement, the interview is terminated at that point. *Shultz v. U.S.,* 351 F.2d 287 (1965). It may be continued, however, as to all matters *other* than the person's own

> guilt or innocence. If he is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must necessarily be left to the judgment of the interviewing Agent.

Miranda, 384 U. S. at 485 (emphasis in original).

In a later footnote, this Court points out it agrees that waiver must be judged by the interviewing agent, that the standard of waiver is high, and that ultimately the issue is for the courts. *Miranda,* 384 U. S. at 486 n. 55.

Thus, it is clear in the *Miranda* and *Edwards* cases that the conversation concerning matters other than the defendant's guilt was permissible. It is submitted that the conversation, in aid of the defendant's request for counsel, is not only allowed by *Miranda* but required. To do otherwise would be to ignore the defendant's request. In *Commonwealth v. Clark,* 454 Pa. 329, 335, 311 A.2d 910, 913 (1973), such an inquiry was held not to be interrogation but "rather a further recognition of" the defendant's *Miranda* rights. *See also State v. Phillips,* 563 S.W.2d 47 (Mo. 1978); *Commonwealth v. Bullock,* 459 Pa. 243, 328 A.2d 493 (1974).

Furthermore, both Dr. Albert and the defendant himself testified that they met alone before Dr. Albert called Captain McDonnell back into the room with Mr. Acquin. It was only after this that the defendant gave his detailed oral and later written statements to the police. Although the defendant claimed in his trial testimony that he asked Dr. Albert during this conversation to get Attorney Engelman for him, Dr. Albert testified that Mr. Acquin merely told the doctor he wanted the doctor there with him. As the doctor stated, if the defendant had told him that he wanted an attorney and was not getting one, he would have done something about it. In these circumstances, when Dr. Albert asked Captain McDonnell back into the room and the defendant gave his statement, it can hardly be claimed that the police "initiated" that meeting or "reinterrogated the accused" at their instance.

Rather, it was the defendant who reopened the dialogue with the police after having privately conferred with Dr. Albert. Given the totality of the circumstances, it is clear that the defendant's waiver was knowing and intelligent and was properly found to be so by the trial judge and the Connecticut Supreme Court. *See Wyrick v. Fields,* 32 Crim. L. Rep. 4099 (U.S. Nov. 29, 1982) (per curiam).

This Court may find a factual situation very much like the one in the instant case in the case of *Leuschner v. State,* 45 Md. App. 323, 413 A.2d 227 (1980), *cert. granted,* 451 U.S. 1014 (remanded for further consideration in light of *Edwards v. Arizona), aff'd on remand,* 49 Md. App. 490, 433 A.2d 1195 (1981), *cert. denied,* 102 S.Ct. 1456, *petition for rehearing denied,* 102 S.Ct. 1743 (1982). The respondent submits that the reasoning of the Court of Special Appeals of Maryland, left undisturbed by this Court, supports the admission of the defendant's confession in this case.

In conclusion, the respondent recalls to this Court's attention the fact that Dr. Albert had no connection with the police and was unknown to them. It is unusual that a confession and waiver of rights is witnessed by such a party who must be viewed in light of his testimony as truly neutral. If a confession given under these conditions must be suppressed and the public deprived of its contents and its fruits, the result would seem to defy reason. The respondent respectfully suggests that nothing in *Miranda v. Arizona* or *Edwards v. Arizona* requires such a result upon a grant of certiorari.

II.

The Connecticut Supreme Court Correctly Concluded that the Defendant's Confession Was Not Obtained in Violation of His Fourth Amendment Rights.

In *Dunaway v. New York,* 442 U.S. 200, 207 (1979), this Court held that for purposes of the fourth amendment's prohibition

against unreasonable searches and seizures, a person who is taken into custody and interrogated at a police station is "seized" in the fourth amendment sense *"when taken involuntarily"* to the station. (Emphasis added). This Court went on to state that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person and probable cause is required of the police at that time. *Dunaway*, 442 U. S. at 207 n.6.

This Court has, however, held that where a person consents to going with the police there is no such seizure. In *United States v. Mendenhall*, 446 U. S. 544, 511-12 (1980), this Court held that since the defendant had agreed to go to the DEA office there was no seizure. In this case, when the police first met the defendant at 9:30 a.m. on July 22, they asked him to accompany them concerning this investigation. Both the police and the defendant himself testified that the defendant then agreed to go with the police. No probable cause was therefore required at that time. *United States v. Brunson*, 549 F.2d 348, 358 (5th Cir.), *cert denied*, 434 U. S. 842 (1977).

The defendant argues that the trial judge assumed for the purposes of his decision that the defendant was taken into police custody shortly before 9:30 a.m. (Petition at 18, 19, 27). It is clear from the court's memorandum of decision, however, that the court assumed that the arrest took place at that time merely for the purposes of argument. (Trial Court Memorandum of Decision, Petitioner's App. F at 7f). The court did not make a finding that the defendant was under arrest at 9:30 a.m.

It was obvious in the instant case that, prior to the 2:00 p.m. meeting on the highway with Lt. Shay, Mr. Acquin had not been seized by the police. This was evidenced by Trooper Hamila's intention which he communicated to Acquin and Hamila's starting to drive Acquin home from Meriden. If Hamila intended to place Acquin in custody, he certainly would not have dropped Detective Zdanowicz off in Prospect and continued alone with Acquin in the front seat of the car toward Waterbury. He certainly would not have allowed Mr. Acquin to leave the car and to start walking

down the road without restraining him. It is submitted that, under all of these circumstances, a reasonable person would have believed that he was free to leave. *See United States v. Mendenhall,* 446 U.S. at 554. In fact, Acquin did so believe when he left Hamila's vehicle and started home on foot.

At 2:00 p.m. when Lt. Shay met the defendant on Route 69, it is clear, from the facts known to the police at that time, that probable cause had arisen to detain the defendant. It was only well after that time that the defendant made his incriminating statements. In these circumstances it can hardly be said that any illegal detention lead to his confession. *See Raulings v. Kentucky,* 448 U.S. 98 (1980); *Johnson v. Louisiana,* 406 U.S. 356, 365 (1972); *United States v. Morris,* 451 F. Supp. 361 (E.D.N.Y. 1978), *vacated and remanded,* 597 F.2d 341 (2d Cir.), *aff'd,* 614 F.2d 1292 (2d Cir. 1979); *State v. Harris,* 298 N.W.2d 356, 358 (Minn. 1980).

The respondent submits that the police did have probable cause to detain the defendant at the Prospect Town Hall on July 22, 1977, where he was interviewed and thereafter at Bethany Barracks where he gave his statements.

When the police began to investigate the nine murders at the burnt-out house on the morning of July 22, 1977, they were aware that the house fire had begun before 3:30 a.m. and had engulfed the entire house. Mrs. Beaudoin had been beaten and stabbed. The eight children, her seven and Jennifer Santoro, an overnight guest, had also been beaten, and some were left tied up in the house to burn to death.

The police had learned that the defendant had been at the Beaudoin house on the early evening of July 21, 1977, and had been seen several times that evening driving his girlfriend's black Rambler on the dead-end street near the Beaudoin house.

Fredrick Beaudoin, Sr., had left home for work at Pratt & Whitney Aircraft about 11:00 p.m. that evening not knowing that Lorne Acquin had been at his house earlier. Mr. Beaudoin was not to return home from work until the next morning.

Fredrick Beaudoin, Jr., had told a neighbor boy on July 21 that Lorne Acquin was to stay overnight at the Beaudoin house that very night. Of all who were to stay in the house that night, Lorne Acquin alone survived.

When they came in contact with Mr. Acquin that day, the police found that Lorne Acquin had not gone to work that morning. The defendant claimed that the marks and scratches on his body were the result of an unreported mugging which occurred shortly after 1:00 a.m. that very early morning when he left the last Waterbury bar alone. However, that afternoon the police observed burn marks on his right eyelid and left wrist which were not accounted for by the claimed mugging.

Mr. Acquin, although a close friend of the Beaudoin family, vehemently refused to go by the house with the police. He, however, showed no surprise or emotion when told of the deaths. This took on particular significance in light of the information that he was to stay at the Beaudoin home the prior night, making him the sole survivor among those known or expected to stay there that night.

Mr. Acquin had a reputation for violence and a long and serious criminal record. He had been staying at the Beaudoin house while there was a fire there in the past.

In *Cupp v. Murphy*, 412 U.S. 291 (1973), this Court found probable cause where the defendant was at the scene of the crime, had a motive to kill the victim, and the occupant of the victim's house or a burglar could not have been the killer. The defendant's lack of concern over his estranged wife's death also contributed to the probable cause. A detailed description of the probable cause appears in *State v. Murphy*, 2 Or. App. 251, 465 P.2d 900 (1970). Certainly probable cause existed here where the defendant, with a long criminal record and a past history of arson, was to stay over at the house the very night of the murders and arson, where he sustained injuries including burns which he exhibited shortly after the crimes, and where he showed no concern about the murders.

III.

The Connecticut Supreme Court's Conclusion that the Defendant's Will To Resist Was Not Overborne by the Conduct of the State Police Is Supported by the Evidence And Is Consistent with Controlling Decisions of this Court.

In his petition, the petitioner makes claim that his will to resist the giving of his confession was overborne by the conduct of the Connecticut State Police.

Dr. Joel Albert, an independent, neutral third party, who had been specifically requested to be present by the defendant, was called as a witness and he testified. Although the defendant, while with the State Police, had the opportunity to retain counsel, he instead opted for the presence of Dr. Albert, "somebody that he could trust." (Trial Court Memorandum of Decision, Petitioner's App. F at 14f). Dr. Albert, whom the police officers did not know and who had been called by the defendant himself, testified that in his opinion the confession given by Acquin was done so voluntarily. (T-17, 7/14/78). Dr. Albert was present and personally observed the defendant and the surrounding circumstances when the defendant gave his confession. Dr. Albert's observations and subsequent opinion of the voluntariness of the defendant's confession were based upon his actual visual and aural perceptions and evaluations. This testimony must be far more convincing than opposing opinions of psychiatrists who were not present at the taking of the confession but rather were called at the hearing as witnesses to give their opinions. Clearly, Dr. Albert's reported observations of voluntariness based upon firsthand experience are more impressive than an opinion from someone not having had the advantage of being present, but rather only called as an expert witness, presented a hypothetical question, and giving his opinion well after the event.

In evaluating the evidence produced at the hearing, the trial court concluded that the defendant's confession was spontaneous and voluntary, just as Dr. Albert testified. No physical force or

threats were used on the defendant nor were any promises made to him. There were never more than three policemen with the defendant at any one time. The defendant was not denied any requests for food or drink. He was not under the influence of alcohol or drugs. He signed the confession and initialed each page. (Trial Court Memorandum of Decision, Petitioner's App. F at 22f).

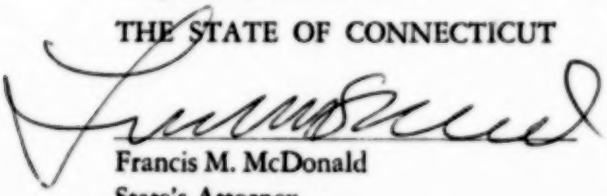
Furthermore, the resolution of this factual issue is hardly one calling for the grant of certiorari because of "special and important reasons."

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

THE STATE OF CONNECTICUT



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APPENDIX

TABLE OF CONTENTS

Page

APPENDIX A -

Trial Court Memorandum Re Motions To Suppress (Sept. 11, 1979) 1a-5a

APPENDIX B -

Trial Court Memorandum Re Motion For New Trial and Motion for Judgment of Acquittal (Nov. 19, 1979) 1b-22b

APPENDIX A

No. 13052

STATE OF CONNECTICUT : SUPERIOR COURT

VS. : JUDICIAL DISTRICT OF WATERBURY

LORNE J. ACQUIN : SEPTEMBER 11, 1979

MEMORANDUM RE MOTIONS TO SUPPRESS
(#37), (#42), (#45), (#49)

The defendant, Lorne J. Acquin, stands charged with nine counts of murder in violation of section 53a-54a of the General Statutes and one count of arson in violation of section 53a-111. On July 23, 1977, a statement by Mr. Acquin in the nature of a confession was signed by him at 5:10 A.M. On March 2, 1979, the court, Wall J., found the confession to be voluntary and "the product of an essentially free and unconstrained choice by the defendant". See, *State v. Staples* 175 Conn. 398, 402, (1978). There are now before the court motions to suppress dated September 19, 1977 and September 26, 1977 addressed to items of physical evidence obtained from the person of the defendant, his residence, or a vehicle owned by Ms. Joyce Graham.

I.

On July 23, 1977 at the request of Trooper Witte, a urine sample and clippings of head hair were obtained from Mr. Acquin under the authority of his oral consent. At the time the urine was obtained, Mr. Acquin was informed that it was for the purpose of determining whether he was under the influence of any drugs or alcohol. The defendant moves to suppress this evidence on the grounds that it was given while in police custody as a result of an initial warrantless arrest, without a warrant, and without a voluntary and intelligent consent. From the evidence, the court concludes that the consent for the urine, while given voluntarily,

Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), was conditioned upon the representation made to Mr. Acquin and is therefore admissible in so far as any tests, including those obtained to show the presence or absence of alcohol and or drugs, but for no other purpose. While the consent of July 23, 1977, executed by Mr. Acquin at 5:18 A.M. is unrestricted as to urine, a request to take blood was withdrawn a short time thereafter. Further, the Supreme Court in *State v. Acquin,* 40 Conn. L. J. No. 42, p. 9, set aside an order to take a blood sample from the defendant. Accordingly, to allow evidence of blood type from an examination of the urine sample would be to permit indirectly what has been disallowed directly.

As far as the hair samples are concerned, the court finds that they are admissible and not subject to suppression. Mr. Acquin, not a newcomer to the law, gave his consent after receiving complete Miranda warnings and without any physical abuse or improper threats. The court finds that this consent was "essentially free and (his) unconstrained choice", and his "will ha(d) (not) been overborne and his capacity for self-determination critically impaired". *Schneckloth v. Bustamonte,* 412 U.S. 218, 225, 93 S. Ct. 2041, 2047, 36 L. Ed. 2nd 854 (1973). As stated in *United States v. Watson,* 423 U.S. 411, 424, 96 S. Ct. 820, 46 L. Ed. 2d 598, reh. denied, 424 U.S. 979, 96 S. Ct. 1488, 47 L. Ed. 2d. 750 (1976), "there were no promises . . . proved or claimed . . . there were no promises made and no indication of more subtle forms of coercion that might flaw his judgment".

II.

On and before July 22, 1977, Ms. Graham was the owner of a 1965 Rambler Classic, 4-door sedan, which she from time to time allowed Mr. Acquin to operate. On that date she executed a consent to search form for that vehicle and a similar form was also executed by Mr. Acquin on July 23, 1977. At the request of Trooper Hamila, the trunk of the vehicle was opened at 4 Glenridge Street and at which time he observed certain items of

personal property. Upon observing these he requested permission to take the vehicle to the Bethany State Police Barracks, which was granted by Ms. Graham. A search warrant for the vehicle was obtained and executed but for reasons not necessary to detail here, including the question of validity, see *State v. Onofrio,* Conn. L. J. Vol. 51 No. 10 pg. 11, the search conducted pursuant to the warrant is found to be without proper authorization.

In evidence are two consent to search forms dated July 22, 1977, signed by Joyce A. Graham, and the other dated July 23, 1977, signed by Lorne J. Acquin. Each of these forms authorizes Trooper Thomas McMullen of the Connecticut State Police Department to conduct a search of the 1965 Rambler automobile. They also authorize "members of the Connecticut State Police Department" to conduct a search. The court rejects the claim of the defendant that any search conducted by anyone but Trooper McMullen is invalid.

In so far as Mr. Acquin relies upon a telephone call from Mr. Lou Gurwitz, an attorney in his attorney's office to revoke his consents, it is without foundation. On July 23, 1977 at approximately 12:35 P.M. Mr. Gurwitz called Lt. James Shay of the Connecticut State Police Department and as related by Lt. Shay the following was the substance of the conversation:

> I received a call from Attorney Lou Gurwitz (phonetic spelling), I believe the correct name is and he indicated that he was associated with you, sir, and he wished to know the whereabouts of your client, Mr. Acquin. I believe I told him he was at that time, at the New Haven State Jail. He also asked me at that time to discontinue any questioning of Mr. Acquin until either yourself or Mr. Gurwitz had a chance to consult with the client.

This being the complete substance of the conversation, it does not constitute a revocation of written or oral consents previously given by the defendant.

The court finds that voluntary consents were given by Mr. Acquin and Ms. Graham and, therefore, the police had authority under those consents to conduct the search on July 23, 1977, at the barracks at approximately 6:50 P.M. The court further finds that Mr. Acquin, not being the owner of the vehicle or being in possession, has no standing to contest any evidence including the shoes and blue socks seized from the vehicle on that date in question. *Rakas v. Illinois,* — U. S. —, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978).

Subsequently on August 2, 1977, a further search of the vehicle was made at which time samples of cloth material were obtained from the interior. As to this search, the court finds that the consents were continuing, unrevoked, voluntary authorizations, and further, that Mr. Acquin not being the owner or in possession had no standing to contest the seizure. *Rakas v. Illinois, Supra.* For these reasons the motions to suppress the shoes and cloth material are also denied.

III.

Prior to his arrest, the defendant resided with Ms. Graham at 4 Glenridge Street, Apartment #4, Waterbury, Connecticut. Both Mr. Acquin and Ms. Graham executed voluntary "consent to search" forms which have been offered in evidence. There was also a search warrant for that property, but no evidence obtained from that search warrant has been offered and is therefore not now before the court. Clearly in view of the fact that Mr. Acquin resided at the property and contributed to the rent thereof, he has standing to contest any claimed illegal search and seizure.

On July 23, 1977, Trooper O'Brien, while conducting a neighborhood search for witnesses, observed a green garbage bag in the rear of #4 Glenridge Street, Waterbury, Connecticut. This bag caught his attention by being brighter in color than the other bags in the area and he thereupon "squatted" down, and observed through a slit in the bag a pair of faded orange pants which appeared to have blood on them. The area was immediately

secured and a request made for the crime lab to report. Thereupon Trooper Witte arrived, took pictures, both before and after the bag was opened, obtaining therefrom the pair of trousers and a white "T" shirt. These items the defendant seeks to suppress on the grounds that they were seized without a warrant and without probable cause and are the fruits of an illegal arrest and confession.

The consent to search form dated July 22, 1977 signed by Joyce A. Graham and one dated July 23, 1977 signed by Lorne J. Acquin are relied upon by the State. Each of these forms authorizes specific members of the Connecticut State Police Department, including Sgt. Nicholas Valerio, Trooper John Witte and Trooper Thomas P. McMullen. They also authorized "members of the Connecticut State Police Department" to conduct a search. Accordingly, the court finds that the consent to search forms constituted authorization for the search and seizure conducted on July 23, 1977. *See Dotson v. Warden,* 40 C.L.J. 6, p. 19 (Aug. 8, 1978). The court further finds that the items in question constituted trash and abandoned property, *United States v. Shelby,* 573 F. 2d 971 (7th Cir.), *Cert. denied,* — U. S. —, 99 S. Ct. 132, 58 L. Ed. 2d 199 (1978), having been placed in a plastic bag and deposited with other items of garbage for collection by the Sanitation Department of the City of Waterbury. The result reached herein is in accord with every United States Circuit Court of Appeals which has considered the issue. *See United States v. Crowell,* 586 F. 2d 1020, 1025 (4th Cir. 1978), *Cert. Denied,* — U. S. —, 99 S. Ct. 1500, 59 L. Ed. 2d 772 (1979), and cases cited therein.[1] Accordingly, the motion to suppress these items is denied.

PICKETT

_____, J.

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1. California and some other states have held *contra. See id.* at 1025 n.2. This court agrees with the observation of Judge Wood of the Seventh Circuit that it seems more prudent to put only genuine trash, not secrets, in garbage cans, except perhaps in California. See *United States v. Shelby, supra,* at 974.

APPENDIX B

No. 13052

STATE OF CONNECTICUT : SUPERIOR COURT

v. : JUDICIAL DISTRICT OF WATERBURY

LORNE J. ACQUIN : NOVEMBER 19, 1979

MEMORANDUM RE MOTION FOR NEW TRIAL (#166) AND MOTION FOR JUDGMENT OF ACQUITAL (#167)

On October 19, 1979, the defendant, Lorne J. Acquin, was found guilty after a trial by jury of nine counts of murder, General Statute § 53a-54a, and one count of arson in the first degree, General Statute § 53a-111. Upon the acceptance and recording of these verdicts, the defendant filed a motion for a new trial and a motion for judgment of acquital.

I.

MOTION FOR JUDGMENT OF ACQUITAL

The motion for judgment of acquital claims that the State has failed to make out a prima facie case and that, as a matter of law, no jury would be warranted in returning a verdict of guilty since the State failed to prove its case beyond a reasonable doubt. No useful purpose would be served by an attempt to review the evidence covering 5215 pages of testimony presented between July 16, 1978 and October 11, 1979. It is sufficient to note that the defendant's confession and physical evidence, along with other evidence, afforded an ample basis for the jury to reach its verdict of guilty.

The trial court is under a duty to set aside a verdict "if its manifest injustice was so plain and palpable as to justify the suspicion that the jury or some of its members were influenced by prejudice, corruption or partiality." *Roma v. Thames River Specialties Co.,*

90 Conn. 18, 19-20. As recently reviewed in *State v. Avcollie,* Conn. (41 Conn. L. J. No. 4, p. 1), the trial judge must see that a jury is not effected by improper inferences and overturn a verdict, "[w]here testimony is thus in conflict with indisputable physical facts, the facts demonstrate that the testimony is either intentionally or unintentionally untrue, and leave no real question of conflict of evidence for the jury concerning which reasonable minds could reasonably differ." *Budaj v. Connecticut Co.,* 108 Conn. 474, 476. The final test is "whether the jury could reasonably have concluded, upon the facts established and the inferences reasonably drawn therefrom, that the cumulative effect of the evidence established guilt beyond a reasonable doubt." *State v. Chetcuti,* 173 Conn. 165, 172; *State v. Avcollie,* supra, 4. Applying these tests to the evidence in this case, the court finds that there is no basis for it to interfere with the verdicts of guilty.

II.

MOTION FOR NEW TRIAL

The motion for a new trial raises similar claims, already discussed by the court, that the verdict was against the weight of the evidence and that the State did not offer sufficient evidence for the jury to find the defendant guilty beyond a reasonable doubt. In addition, this motion claims that the court erred in its charge in rulings upon evidence during the trial and that rulings upon motions were erroneous.

II.

A.

CLAIMED ERRORS PRIOR TO TRIAL

Prior to trial the Honorable Robert A. Wall[1] heard pretrial motions filed by the defendant. These motions include a motion

1. Judge Wall was originally scheduled to preside at the trial of this case but did not since he was to reach retirement age before its conclusion.

for expenses for a public opinion survey (#57.5), denied January 3, 1979, memorandum (#65), a motion to dismiss the indictment on the grounds that its foreman was hand picked and white (#111), denied May 16, 1979, memorandum (#112), a motion to dismiss jury panel (#71), denied May 16, 1979, memorandum (#113), and a motion for change of vanue (#57), denied May 17, 1979, memorandum (#115). The reasons for the denial of these motions are well documented in the memoranda of Judge Wall. The court notes, however, that while considerable time was required to select a jury of twelve together with four alternates, the major difficulty was not pretrial publicity but rather the projected length of the case and prior plans of prospective jurors during employment shutdowns and vacations. The defendant has not sustained his burden of showing that he could not receive a fair and impartial trial in Waterbury. *State v. Rogers,* 143 Conn. 167, 172; *State v. Piskorski,* Conn. (40 Conn. L. J. No. 51, pp. 1B, 3B).

During the summer of 1978, Judge Wall conducted a lengthy evidentiary hearing on the defendant's motion to suppress his confession, statements and admission. (#33). This motion was denied March 2, 1979, for the reasons set forth in a memorandum dated February 28, 1979, in which Judge Wall found that "the State . . . sustained its burden of proof that the defendant's confession was voluntary by a fair preponderance of the evidence" and that it "was the product of an essentially free and unconstrained choice by the defendant." See *State v. Staples,* 175 Conn. 398, 402 (1978). While this ruling was accepted as the law of the case, this court also heard many of the same witnesses as well as Mr. Acquin during a hearing on a motion to suppress tangible evidence, and concurs in the findings of Judge Wall.

The second juror accepted by both the State and the defendant was Mr. Paul T. Reeder. The defendant claims that in view of the provisions of § 51-219 of the General Statutes, Mr. Reeder was disqualified as a matter of law by reason of his being a member of the Middlebury volunteer fire department. At the time this

juror was chosen on June 6, 1979, the statute exempted "all regular members of . . . any fire department . . . organized under the laws of this state . . . ." Mr. Reeder did not claim an exemption but indicated a willingness to serve. Further, as indicated, he was accepted by the defendant who was given thirty challenges - eighteen on the indictment, eight on the information, and four additional for the choosing of four rather than two alternates. From his acceptance of the juror, it is reasonable to infer that Mr. Reeder was found to be well qualified unless disqualified as a matter of law.

The issue raised by the defendant's claim may be disposed of by an examination of Public Act 79-386 effective October 1, 1979. It includes in the list of persons exempt from jury duty "regular active members of any volunteer fire company." Since this group had not been listed before this statutory change, it is apparent that the general assembly did not consider the former statute as covering it. See *Engle v. Personnel Appeal Board*, 175 Conn. 127, 130. The court finds no merit to the claim that Mr. Reeder was disqualified as a matter of law since he was eligible when chosen and sworn as a member of the panel.

III.

CLAIMED ERRORS DURING THE TRIAL

Admonitions and Inquiry of Jury

On July 7, 1978, the American-Republican, Incorporated, filed an action against Judge Wall's order to close the suppression hearing of Mr. Acquin's confession which he had requested. *American-Republican, Inc., et al v. Hon. Robert Wall et al,* CV H78-348. After hearing, the United States District Court, Clarie, J., ruled on July 19, 1978, that "Judge Wall's cloture order does not violate the plaintiff's constitutional rights." Thereafter there was a further hearing and a ruling by Judge Clarie on June 19, 1979, after the selection of a jury in this case was in progress, which again denied a motion for temporary injunction to grant immediate

disclosure but ordered that "when the jury and alternates have been impaneled and sworn, the defendant, Court Clerk Francis J. Butler, shall make available to the press and the public all transcripts and exhibits, except such matter as is otherwise subject to a privilege, which have hereto been sealed by the state court's order."

As part of its written memorandum the court included the following:

> "While each trial judge has his own methods for securing compliance with his disciplinary instructions to the jury, the presiding judge at a minimum would be expected to deliver a stern admonition to the jury at the close of each court session, stressing the importance of avoiding reading about, listening to accounts of, or discussing the trial with anyone. This would be followed up on the record with questioning at the opening of each court session, including individual inquiry where necessary, to insure that the court's instructions were being obeyed. On each such occasion, counsel should be asked to affirm on the record their satisfaction, or lack thereof, with the jurors' responses."

At the conclusion of the morning and afternoon sessions, the court instructed the jury not to read about the case, listen to any news broadcasts, discuss it with anyone, or allow anyone to communicate with them. In addition, upon their return the court inquired as to whether or not anyone had anything to bring to its attention which might influence his or her decision. Both counsel in their questioning of prospective jurors, and the court after the jury was selected, impressed upon each juror the importance of determining the issues in the case from the evidence found to be admissible and the law as given by the court. It is the law of this state, and no doubt every state, that a trial judge has a wide and liberal discretion in the conduct of a trial with the view to seeing to it that both the interests of the state and the defendant are pro-

tected. *Antel v. Poli,* 100 Conn. 64; *Wojculewicz v. Cummings,* 145 Conn. 11, 21. To require, as the federal court suggests, that "counsel should be asked to *affirm on the record their satisfaction, or lack thereof,* with the juror's responses" [Emphasis added] to inquiries by the court about outside influences, is to ignore the essence of the adversary system. There are few, if any, defense counsel who would make such an admission on the record. The court rejects the suggestion of the defendant that the trial was not conducted in accordance with the guidelines of *American-Republican, Inc. et al v. Wall,* if, in fact, that case has any bearing as far as Mr. Acquin is concerned since he was initially the moving party for cloture.

B - PHOTOGRAPHS

The State offered in evidence certain photographs of the bodies of the victims after debris had been removed but while their bodies were in the same place and condition as found by the medical examiner. (Exhibits NN, OO, PP, QQ, RR). These pictures were offered to show "the condition of the bodies especially with respect to their being and the conditions of their limbs with respect to the bindings and the condition of the bodies shortly before they were removed for the chief medical examiner's office . . . . " Tr. Vol. 9, A.M., p. 40. The defendant objected to the offer on the ground that the photographs were inflammatory and that the State had not shown that the bodies remained in the same position and their condition had not been altered. After conducting a hearing on the latter objection, the court allowed the photos as full exhibits.

If a photograph is relevant and material, the fact that it may be gruesome does not render it inadmissible. *State v. Marshall,* 166 Conn. 593, 602. The offer of these photos was relevant to the claims by the State as to the murder of the victims and their being bound as portrayed and were, therefore, admissible. *State v. Schaffer,* 168 Conn. 309, 313.

Also offered in evidence were pictures of the defendant taken at the Bethany barracks on July 23, 1977, which were offered to show

scratches and burns upon his body. (Exhibits KKKK, LLLL, MMMM, NNNN, OOOO). Tr. Vol. 17, pp. 58-75. These pictures were objected to on the grounds that they were the fruit of the illegal arrest of the defendant and his oral confession. After a hearing in the absence of the jury, the court overruled the objection and allowed the photos in evidence to show claimed scratches and burns on Mr. Acquin's body. For this purpose they were relevant and material and therefore admissible. *State v. Castagna,* 170 Conn. 80, 89.

C - MOTIONS FOR MISTRIAL AUGUST 3, 1979

On August 3, 1979, during the afternoon session, counsel for the defendant made a motion for mistrial claiming that his client could not have a fair trial since the grandfather of the Beaudoin children was escorted from the courtroom during the testimony concerning autopsy reports by Dr. Catherine Galvin. Tr. Vol. 12, P.M., p. 52. The court denied this motion and in addition refused to instruct the jury at that time not to be influenced by any outburst in the courtroom. Tr. Vol. 12, pp. 14, 15a, 15b. The ruling of the court was based upon the fact that Mr. Champagne had not been a witness or otherwise identified to the jury. Further, his exit was not any more disturbing than any other individual who might have left at the time, whether required by emotion or any other personal dictate. Had the court cautioned the jury at that time, without referring to the incident, the instruction would have been meaningless. To have referred to it would have only brought it to the attention of the jury and, therefore, magnified the incident in their minds. Finally, the court, before jurors were selected, during the course of the trial, and in its charge gave numerous instruction as to the duty of the jury to consider the case only from evidence admitted in the trial. The court finds no basis for the claim that this motion for mistrial or for cautionary instructions should have been granted. *State v. Brown,* 169 Conn. 692, 703.

During her testimony on August 3, 1979, Dr. Catherine Galvin sought to refresh her recollection and had difficulty locating a page

in her file. Tr. Vol. 12, P.M., p. 27. She offered the comment that it might not have been returned when her autopsy report was copied for Mr. Williams. Mr. McDonald suggested that Mr. Williams let the doctor see his copy and the court made the same suggestion. The defendant's copy was not turned over but the missing page was found in another autopsy file by Dr. Galvin.

In the absence of the jury the defendant moved for a mistrial on the ground that by its comment the court informed the jury that defense counsel had been given copies of this witness's report. It is difficult to understand the thrust of the defendant's claim, since with each witness the jury observed counsel referring to various documents in his cross-examination. Since the document in question was a copy of the official report, the court finds no prejudice to the defendant by the jury being aware that his attorney had in fact seen it, and, therefore, finds no basis for a mistrial. *State v. Grayton,* 163 Conn. 104, 112; *State v. Turcio,* Conn. (40 Conn. L. J. No. 52, p. 4, 12).

D - CLAIM RE EX. 66 ID

On August 1, 1979, during the course of his examination of Dr. Elliot Gross regarding the results of the autopsy of Sharon Lee Beaudoin, Mr. McDonald referred to his trial folder, ex. 66 ID, which contained an 8 x 10 inch copy of a black and white photo of this victim and a 2 x 3 inch color photo of the seven Beaudoin children. During a portion of this examination Mr. McDonald was positioned at the corner of the jury box where juror #8, Mr. Herbert Hughes, was seated. Mr. Williams moved for a mistrial or, in the alternative, the right to voir dire the juror as to whether he had seen the photos, which requests were denied.

The court finds that this inadvertent occurrence was not such that it is apparent that the defendant could not have a fair trial. *State v. Peary,* Conn. (40 Conn. L. J. No. 13, pp. 1, 2. The pictures were not inflammatory and further, from the court's observation, it cannot be concluded that Mr. Hughes did, in fact, see

either. To have permitted a voir dire would only have brought to that juror's attention something he may not have seen, and if he did, to have magnified the incident. Finally, the court, on numerous occasions during the trial and in its charge, instructed the jury that it could consider only evidence found to be admissible. This claim of the defendant is rejected in the discretion of the court. *State v. Ruiz,* 171 Conn. 264; *State v. Brown,* 169 Conn. 692, 703.

E.

TESTIMONY OF TROOPER GEORGE R. HAMILA AUGUST 14, 1979

On July 22, 1979, Mr. Acquin was picked up and taken to the command post at the Prospect Town Hall where Trooper George R. Hamila, after advising the defendant of his rights, proceeded to take his statement, commencing at approximately 3:15 p.m. At around 5:30 p.m. the taking of this statement concluded. Over objection the court allowed the witness to inform the jury what happened at that time.[2] The defendant moved for a mistrial on the ground that the State had shown the defendant's invocation of his right to remain silent.

First, it must be noted that Mr. Hamila had been allowed to testify without objection that he had commenced the taking of

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2. By Mr. Scanlon: Q. Did it conclude at 5:30 or 5:45?

A. Yes it did.

Q. Tell us what happened at that time.

Mr. Williams: Objection Your Honor please, on grounds stated previously.

The Court: Overruled.

By Mr. Scanlon: Q. Tell us what happened.

A. Lorne stated to me that—he says: "I think I am in trouble, I think I better get a lawyer."

Tr. Vol. 17, P.M., pp 10, 11.

a statement which continued for over two hours. In view of this the jury was entitled to hear the reason for the termination of the interview, especially since a seven page confession was to be admitted into evidence. (Exhibit JJJJ).

The claim of the defendant that the cases of *Doyle v. Ohio,* 426 U. S. 610, 96 S. CT. 2240, 49 L. Ed. 2d 91 (1976) and *United States v. Hale,* 422 U. S. 171, 95 S. CT. 2133, 45 L. Ed. 2d 99 (1975) are governing is rejected. These consider the use of a defendant silence while in custody for impeachment purposes and, further, the line of inquiry was actively pursued rather than, as in this case, a single reference to a response by the defendant that he better get a lawyer. *Meeks v. Havener,* 545 F.2d 9, 10 (6th Cir. 1976). As stated in *State v.Zeko,* Conn. (40 Conn. L. J. No. 47, pp. 1, 5, "The instant case does not present a prosecutorial focus—by repetitive questioning, on a defendant's silence, as in *Doyle v. Ohio,* supra."

E
MOTION TO CLOSE SUPPRESSION HEARING

On August 16, 1979, the court began hearing evidence in the absence of the jury on the defendant's motions to suppress (#37, #42, #45 and #49). Later in the day his counsel moved to close the hearing to the press and the public. Practice Book § 895. Representatives of the news media objected to this motion and requested a hearing to determine its necessity. See *Gannett Co. v. DePasquale,* — U. S. —, 61 L. Ed. 2d 608, 99 S. Ct. 2898.

At the time the motion was made the jury had been excused until August 28, 1979, while the court heard evidence on the motions. In view of the concurring opinion of Justice Powell in *Gannett,*[3] the court concluded that such a hearing was required

3. "Upon timely objection to the granting of the motion, it is incumbent upon the trial court to afford those present a reasonable opportunity to be heard on the question whether the defendant is likely to be deprived of a fair trial if the press and public are permitted to remain in attendance." Concurring opinion of Justice Powell.

and further determined that rather than risk a delay by a further application to the federal courts if a motion to close were granted, that a postponement of the hearing until after the jury was due to return was advisable.

On August 28, 1979, the jury reported and were instructed that the court was still considering matters which did not require their presence and also was given detailed cautionary instructions as to their duty not to allow any outside influence or information effect their impartiality. See Appendix A. The defendant's motion to exclude the public was denied and the hearing continued until the jury returned on September 11, 1979. On that day the court filed a memorandum (#142) denying the motion to suppress except that the use of a urine sample to test for blood type was sustained. In view of the fact that none of the jurors indicated than any information was received during the course of the suppression hearing, and further that except as indicated the motions were denied, the court finds that the refusal to exclude the public was proper in its discretion. See *State v. Echols,* 170 Conn. 11, 13.

F

MOTION TO STRIKE TESTIMONY

On August 29, 1979, the court granted the defendant's motion to make the State's file available to him for examination. Thereafter, on September 13, 1979, he moved for a mistrial or strike the testimony of Mr. Fred Beaudoin, Mr. Alden Brooks, Capt. Thomas McDonnell and Ms. Frances Paolino (#141). This motion claims that the prosecuting authority had elected "not to comply with an order of the judicial authority to deliver to the defendant any statement of a witness who has testified . . . . " The court found that the State had not *elected* not to comply, that some of the material would not have been admissible, did not constitute a *statement,* and that at best the failure to deliver was inadvertent. This motion was denied on the condition, agreed to by the State, that any or all of these witnesses would be produced, if requested, at the expense of the State. No prejudice to the defendant is found in this ruling.

G

MOTION TO DISMISS OR MISTRIAL

SEPTEMBER 13, 1979

On September 13, 1979, the defendant filed a motion to dismiss or a mistrial "based on gross prosecutorial conduct during this trial." Tr. Vol. 30, A.M., p. 3. He claimed that the State had in its file information that the autopsies were conducted before the confession and that prejudicial photographs were displayed to the jury. The court finds no merit to either of these claims. Copies of all autopsy reports were furnished to the defendant, and in addition, each pathologist was a witness and available for cross-examination. In regard to the display of prejudicial photos to the jury, the court believes that if in fact any juror or jurors did see a picture in the State's file, its instructions both during the trial and in its charge covered any possible prejudice.

H

CHAIN OF CUSTODY AT F. B. I.

The defendant claims that the State did not complete the chain of custody of physical items transported to the F.B.I. The burden of proof in the chain of custody issue is upon the State, *State v. Johnson,* 162 Conn. 215, 232, but it "is not compelled to prove each and every circumstance in the chain of custody beyond a reasonable doubt." *State v. Hall,* 165 Conn. 599, 605. The court finds that the State sustained its burden by detailed and credible evidence.[4] *State v. Brown,* 163 Conn. 52, 57; *State v. Lockman,* 169 Conn. 116, 122.

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4. In view of the numerous items of physical evidence, Chief Inspector Foley, Trooper John R. Witte, members of the State Police, and Asst. Clerk Edmund Diorio are to be commended for their attention to detail in documentation and preservation of the evidence before and during trial.

I

TESTIMONY OF MR. BERTIE PITTMAN

The State called as a witness Mr. Bertie Pittman, a boatswain's mate in the United States Coast Guard. The court found him to be qualified in the field of knot-tying and allowed testimony concerning the manner in which the knots on the bindings used to tie the victims were made. The court also allowed into evidence pieces of cloth seized from Ms. Joyce Graham's Rambler car on August 2, 1979, and permitted testimony as to the manner in which knots on one of these pieces had been tied.

The car had been seized on July 22, 1977, examined for blood July 25th, for fingerprints on July 26th, and completely inventoried on July 28th without these items being noticed. Trooper Witte, however, testified that he observed them on July 23, 1977, and found them in the same area on August 2nd. In addition to this testimony the jury had before it the testimony of Ms. Graham that she had used the cloth strip to tie her glove compartment.

In view of the conflicting testimony the court instructed the jury to disregard any testimony concerning the cloth unless it found Mr. Acquin tied it, that it was in the vehicle when seized and remained in substantially the same condition when admitted into evidence. The court rejects any claim of error, especially in view of the charge concerning this item to which there was no objection. See Appendix B.

J

EVIDENTIAL RULINGS

1. Fire at Home of Dr. Santoro

The defendant offered evidence that a fire, possibly intentionally set, occurred on August 11, 1977, at the home of Dr. Grace Santoro located on Rosewood Drive in Prospect. The claim for admissibility was that since arson could be inferred, and the victim of the fire was a Santoro relative, the same person who set the Beaudoin

fire set the fire at the Santoro home, while Mr. Acquin was in custody. It was represented to the court that Dr. Santoro was a sister of Jennifer Santoro's grandfather who had never seen Jennifer.

After a hearing in the jury's absence, the court sustained the State's objection on the grounds that the offer was remote and speculative. Tr. Vol. 38, A.M., p. 33. Evidence is admissible when it tends to establish a fact in issue, or to corroborate other direct evidence. *State v. Schaffer,* 168 Conn. 309, 317; *State v. Rose,* 168 Conn. 636. However, there is "no precise and universal test of relevancy and the question must be determined in each case according to the teachings of reason and judicial experience." *State v. Towles,* 155 Conn. 516, 523; *State v. Rose,* supra. Trials must be kept within reasonable bounds as to the time they occupy and the range they cover. *State v. Sebastian,* 81 Conn. 1, 4. For these reasons the court excluded the proffered testimony.

2. Statement of John Ricciuti

On October 10, 1979, the defendant attempted to introduce a written statement of Mr. John Ricciuti, the owner of The Red House Cafe, an establishment where Mr. Acquin had been on the evening of July 21, 1977. Tr. Vol. 41, pp. 15-25. In particular, counsel offered so much of the statement as provided, "the last time I observed Lorne Acquin was at approximately 1:00 A.M.—7-22-77 when he was leaving with the male that I described—While Acquin was in the establishment he appeared to be normal *not* drunk and causing no trouble." Exhibit 155 ID.

This statement, while signed, was not sworn to and was not a deposition which could have been admitted under the provisions of General Statute § 54-86 and Practice Rule § 789 et seq. Clearly, the statement was hearsay and, therefore, not admissible unless permitted under some exception to the rule. *General Motors Acceptance Corporation v. Capitol Garage, Inc.,* 154 Conn. 593, 597; *Izzo v. Crowley,* 157 Conn. 561, 563. Since there was no

evidence that the circumstances surrounding the statement provide any sanction for ascertaining its truth, it was not admissible. *DiMaggio v. Cannon,* 165 Conn. 19, 22.

IV
CLAIMED ERRORS IN CHARGE AND SUBMISSION OF CASE TO JURY

A.
REQUEST TO PROVIDE TRANSCRIPT AND JURY INSTRUCTIONS

The court denied written motions by the defendant that the court provide a "properly-edited trial transcript" (#153), and a copy of its instructions (#161). As to the first motion, it is noted that the transcript contains over five thousand pages and to have edited the objectionable portions, as well as evidence heard only by the court, would have been a time consuming task necessitating a lengthy delay. Likewise, Practice Book Rule, § 863 provides that if after retiring the jury requests a review of certain testimony, "the judicial authority . . . shall have the requested parts . . . read to the jury." No reason has been advanced to ignore this rule or to indicate that the jury was not satisfied with the reading of those portions of the evidence which it did request.

B.
CLAIMED ERRORS IN CHARGE

The evidence in this case concluded on October 11, 1979, at which time the court gave a copy of its proposed charge to counsel for the State and the defendant. Many of these instructions were incorporated by the defendant in his request for instructions (#160). The defendant registered four objections to the charge.

First, he objected to a portion of the charge which stated, "Now, although it is true that the burden of proving an accused is of sound mind is upon the State, it is also true that because most men are of sound mind absent evidence to the contrary, you may

infer from the facts, as you find them to be, that the defendant was of sound mind at the time of the incident upon which the charge is based unless some credible evidence tending to prove the contrary has been introduced."[5]

In so far as this exception is concerned, it appears that as counsel stated, "it [is] a small difference." Tr. Vol. 44, p. 72. In view of the fact that the court charged the jury that it might "infer" rather than "presume", there seems no just ground for objection. *State v. Harrison,* Conn. (41 Conn. L. J. No. 9, p. 3. Further, it has long been the law of this state that a jury is entitled to presume sanity, or as the court instructed in light of *Harrison,* to infer sanity, until the defendant offers substantial evidence tending to prove insanity. *State v. Rossier,* 175 Conn. 204, 209. (1978).

The second exception to the charge was the failure to include the second sentence of his request #49: "A jury is entitled to draw such inferences from a person's conduct as are reasonable inferences. But in a criminal case no inference can be drawn from conduct unless the conduct itself is proven beyond a reasonable doubt."

In view of the charge as read in its entirety, the court finds no merit to this exception. *Anderson & McPadden, Inc. v. Tunucci,* 167 Conn. 584, 590; *State v. Rathbun,* 74 Conn. 524, 527.

The third exception included the so-called Chip Smith charge, *State v. Smith,* 49 Conn. 376, 386, in its original charge. See Appendix C. Numerous appeals have raised an objection to this charge on the grounds that it is coercive and deprives a defendant of the free judgment of each juror. *State v. Peary,* Conn. (40

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5. The second element which the State must prove beyond a reasonable doubt is that at the time of the death of these individuals, the person causing the death or deaths was of sound mind, that is, legally sane. A person is of sound mind, legally sane and is responsible for his crimes and unlawful conduct, if at the time of such conduct he does not, as a result of mental disease or defect, lack substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. Request to charge #24.

Conn. L. J. No. 13, p. 1, 6, and cases cited. The giving of a charge on the duty of jurors' obligation to listen to the comments of their respective jurors in the initial charge was sustained in 1925, see *State v. Schleifer,* 102 Conn. 708, and has recently been approved in *State v. Peary,* supra at 5.

The final exception by the defendant was the failure to include his request #53.[6] In view of the fact that there was no eyewitness testimony connecting Mr. Acquin to the scene of the crime, the court determined that this instruction would be inappropriate and, therefore, meaningless to the jury. "The charge to a jury must give it a clear understanding of the elements of the crime charged and the proper guidance to determine if those elements were present", *State v. Avila,* 166 Conn. 569, 574; *State v. Alterio,* 154 Conn. 23, 27; but a defendant is not entitled to a charge inconsistent with his claims of proof. *State v. DiBella,* 157 Conn. 330, 345. Since the defendant at all times denied his guilt, and there was no eyewitness testimony placing him at the scene of the crime when it is claimed to have occurred, the court finds no reason to justify the giving of the requested instruction.

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6. The vagaries of eyewitness identification are wellknown and you should receive with caution any identification testimony from any eyewitness and consider carefully whether that witness is really accurate in his or her belief. You should scrutinize with the greatest care any such eyewitness identification testimony before accepting it because the annals of criminal law are filled with instances of mistaken identification. As the late Supreme Court Justice Felix Frankfurter once said: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials." [*United States v. Wade,* 388 U.S. 218, 228, 87 S. Ct. 1926, 1933, 18 L. Ed. 2d 1149 (1967) (Brennan, J.); *Macklin v. United States,* 409 F.2d 174, 178 (D.C. Cir. 1969); *United States v. Cognato,* No. N-75-153 (D. Conn. 1976; Newman, J.)].

For the reasons set forth, the motions for judgment of acquital and motion for new trial are denied.

PICKETT

_____, J.

APPENDIX A

THE COURT: Ladies and gentlemen, the purpose of my conferring with counsel at the bench, the court has certain matters that will not require your attention.

As I have indicated to you many, many times, it's of extreme importance, especially in view of the length of time that we have been proceeding with this case, that you do not read anything about it, discuss it with anyone, allow anyone to discuss it with you.

You will recall that you were given an oath, that you would without respect of person or favor of any man, well and truly try, and true deliverance make, between the State of Connecticut and the defendant, who you shall have in charge, according to law and the evidence before you; our own counsel and your fellows, you will duly observe and keep; and you will speak nothing to anyone of the business or matters you have in hand, but among yourselves, nor will you suffer anyone to speak to you about the same, but in court.

Of course, as I have instructed you, ladies and gentlemen, that means until you have heard all of the evidence that is found to be admissible through oral testimony and any exhibits.

The purpose of my remarks to you at this time is for your convenience. I anticipate that the court will be engaged, not only today, but probably tomorrow on hearing these matters. I would prefer not to have you report back and have you sitting in the jury room to remind you of what I have already just reminded you. From my observation, you appear to be an intelligent and dedicated group of citizens. And, I trust that you will be able to follow these instructions.

And, so, I ask you upon the oath which I have just reminded each of you: is there anyone that has any question, any question whatsoever, that you will not be able to follow that oath, that instruction and not read anything about the case or discuss it with anyone?

Of course, if evidence comes in at a later time, you will hear it. If it is not, as I have instructed you, it is no cause for you to be concerned with what evidence the court may have heard outside your presence.

So, I would prefer not to have you report back tomorrow because the court will be engaged. But, I ask you: does anyone have any question in his or her mind whether or not that you will be able to return, probably, Thursday morning without being tainted or read anything about it or discuss it with anyone for any reason? This is for your convenience, ladies and gentlemen. I would prefer not to bring you back and have you sitting in the jury room. It is for your convenience, but obviously this has to work both ways. I want to cooperate with you, but obviously you have to cooperate with the court. Does anyone have any reservation whatsoever?

I will take it, ladies and gentlemen, that you will remain as impartial as you are at the present time and you will not consider anything about the guilt or innocence of your ultimate verdict of this case until you have heard all of the evidence, at the conclusion of the case, the argument of counsel and the charge of the court.

I am asking you, however, to contact the clerk's office tomorrow afternoon, sometime after three-thirty, because it may be that your presence will not be required on Thursday either. You are not sitting on Friday. Therefore, it would mean you would not return here until next Tuesday, the 4th. So, you will have—could be as long a time as a week for you to remember to keep yourself fair and impartial as you are at the present time.

I hope I am not taking an undue risk, ladies and gentlemen, but I am sure that I can trust you and that you will follow the court's instruction.

You may be excused now until Thursday morning with the request that you do contact the clerk's office. If it's not necessary for you to come in on Thursday, then you will report back next Tuesday, the 4th, at ten o'clock. You may be excused at this time. Transcript, Vol. 21, pp. 61-65, Aug. 28, 1979.

APPENDIX B

Ladies and gentlemen, you will recall that physical evidence consisting of certain pieces of cloths, looks like 6-Ps, taken from a 1965 black Rambler automobile on August 2nd, 1977, owned by Joyce Graham, was offered in evidence. You will recall that the vehicle was taken into police custody on July 22nd, 1977, examined for blood on July 25th, 1977, examined for fingerprints on July 26, 1977, and an inventory was made on July 28th, 1977. It will be for you to determine whether these pieces of cloth were in the vehicle at the time it came into police custody and whether they remained in the same general condition when admitted into evidence. If you find to the contrary, then this evidence shall have no weight in your deliberations and you will draw no inference from their admission. In this connection you will also bear in mind the testimony of Ms. Graham who testified that these items were hers and tied by her to secure the glove compartment on her car. If you find that they were in the vehicle on July 22nd, 1977, and remained in the same condition and were tied by Mr. Acquin, then you may consider them in the light of the testimony of Mr. Bertie Pittman and Mr. Graham Hall, witnesses offered by the State and the defendant, as individuals with particular knowledge or expertise in the field of knot tying. You may give such weight and draw such inference to this material as you find warranted based upon your assessment of the qualifications of the witnesses testifying for the State and the defendant. Charge to Jury, Transcript Vol. 44, pp. 14-16, October 17, 1979.

APPENDIX C

Finally, ladies and gentlemen, I will conclude with this instruction: a verdict in a criminal case must be unanimous, one with which all of you agree. Usually, there are some differences of opinion by jurors when they first retire. As reasonable people, they discuss these differences and try to reconcile. If a jury cannot come to an agreement upon a verdict, the case usually must be tried again before a different jury. A second trial imposes a severe hardship upon the parties involved, the State and the accused. You must, therefore, make every reasonable effort to come to a verdict. You must listen to what other jurors say. You must not hesitate to reconsider your own opinion. If few of the other jurors do share your viewpoint, you should carefully examine its soundness. All of you have heard the same evidence, the same explanation of the law. As reasonable people, you should ultimately be able to come to some agreement upon a verdict. On the other hand, the verdict must be one which each juror considers just in his own mind. A juror cannot desert his firm and honest convictions simply in order to reach an agreement which he regards as wrong. Transcript, Vol. 44, pp. 68-69, October 17, 1979.